UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

RICHARD J. MCCLINTON, Plaintiff,

vs.

COGENCY GLOBAL, INC., Defendants.

2:20-cv-543-AMM

January 24, 2023

Birmingham, Alabama

10:30 a.m.

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REPORTER'S OFFICIAL TRANSCRIPT OF
SHOW CAUSE HEARING

BEFORE THE HONORABLE ANNA M. MANASCO
UNITED STATES DISTRICT JUDGE

COURT REPORTER:
Teresa Roberson, RMR
Federal Official Court Reporter
1729 Fifth Avenue North, Ste. 200
Birmingham, Alabama 35203

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A P P E A R A N C E S

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P R O C E E D I N G S

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THE COURT: Please state your appearances.

MR. EDWARDS: Blake Edwards appearing for the plaintiff Jason McClinton.

MS. EDWARDS: Nicole Edwards appearing for the plaintiff Jason McClinton.

MR. HOLBROOK: Bryan Holbrook for the defendant Capstone.

MR. KLASS: David Klass for defendant.

MS. WALKER: Marion Walker for the defendant.

THE COURT: Good morning. All right. So we've got several things to do today.

Couple of things, I guess, first, I have some questions. And then I want to know a little bit more about the attempt that was made previously to mediate the case and what the -- I'm not quite clear on what the current status is from the statements on mediation that were filed. And then we will today enter a pretrial order, so I'll go ahead and give y'all the dates that are embedded in that.

Before I start with my questions. Tell me a little bit more about what the parties' respective positions are on further mediation.

MS. EDWARDS: Your Honor, we are always willing to

mediate. We were ordered to mediate earlier in this case, it was unsuccessful. That could have been because no depositions were taken, I'm not sure. But we were so far apart. Brett Adair was our mediator in that case. We picked him because he knew both sides, but he just couldn't get us there. And the numbers were so far apart that I think we ended it at a half-day mediation.

Prior to that, we started talking about mediation after Your Honor entered her opinion and order. And it was from our client's perspective that we would love to go, but we just can't pay for it again.

And I don't think the defendant was willing to go to mediation that they had to pay for.

And then the other side asked about a magistrate mediation. And I explained to them that you only get so many, and so I can't really agree to that without knowing who you're choosing to go to. So that's kind of where we are from my position.

THE COURT: Well, the way the magistrate mediation works is that district judges have a limited number of opportunities per year to refer them. We don't refer them to specific magistrate judges. We refer to a magistrate judge.

So, number one, you could certainly agree to ask me to refer it to a magistrate judge, and I would have to --

I take a lot of considerations into account with that. Sometimes mediations that need to occur at no cost are a consideration; sometimes where we are in the calendar year is a consideration because I have exhausted all my cards; and sometimes where there's agreement that the case is a candidate for mediation is a consideration.

But certainly there is no limitation that -- the limitation is on me, it's not on y'all. Y'all can certainly agree to ask for that.

The previous mediation, were costs shared -- entirely by the plaintiff, entirely by the defendant or both?

MS. EDWARDS: Divided equally, Your Honor.

THE COURT: Okay. So the plaintiff's position is that it would not be willing to divide them evenly again, except that, I assume, by Court order.

MS. EDWARDS: Yes, Your Honor. We obviously have put a lot of expenses into the case, and we're not in a position where we can do that.

THE COURT: Defendants.

MR. KLASS: Your Honor, I believe we mediated it in -- this case in summer of 2021, and we do agree that we were pretty far apart at that mediation. I don't know if either party's position has changed materially since then, but we are still open to mediating the case again, whether

it's before a magistrate judge or a private mediator.

Mr. Adair had reached out some months ago, I think he would be willing to mediate again. I thought he was good.

In terms of, I think the breakdown, most recently, it was over defendant agreeing upfront to pay plaintiff's share of the mediation costs.

And our position is, this is plaintiff's case, the default is that the parties split mediation costs equally.

Of course, if there's an agreement reached at mediation, it's common for the defendant to pick up the cost at that time, but that's not something that the defendant is willing to do up front.

THE COURT: Good it. Understood. That's all helpful to me.

So my practice is not to try a case that has not mediated, but y'all have mediated once. So I would not necessarily require you to mediate again unless it were a situation where there were, you know, through a consensus among the lawyers that this case was a really good candidate for settlement and it would be unwise or just not fruitful to try it, and then I would probably order you to mediate again because trying a case that should have settled is in nobody's interest.

So that is helpful to me to figure out where we

are. I would encourage you to continue the conversation among lawyers.

It sounds to me like there has been a material change in circumstances since the first mediation in that we are now through discovery and past summary judgment.

So it's not, you know, I do not see why there would be any difficulty in more appropriately valuing the case. Whereas I could certainly see that before summary judgment and before discovery had completed.

So let me ask, I guess the next thing we'll do before we talk about pretrial, I need to ask some questions about the motions to strike and the oppositions and the summary judgment motions.

I'm going to start with the plaintiffs. And y'all can take these at the table or at the lectern, wherever suits you best.

So, plaintiff's first response brief was Doc 72. Second one -- well, let's talk about Doc 72 first because I have got it.

All right. So, for Doc 72, the first thing that caught our eye was the half-inch margins. And the next thing was the substantially lengthy footnotes -- single-spaced, ten point, twenty-seven of them.

And then the next thing was the charts. Although I understand your argument that those were included for the

convenience of the Court, and I don't doubt that sometimes charts can be really helpful.

So you got a ten page extension, but then made changes to the formatting to cram substantially more than forty-five pages worth of information into a forty-five page brief.

Well, actually, hang on, let's see. Forty-two and a half page brief. Why?

I guess part of my question, why didn't you ask for a fifteen page extension.

MS. EDWARDS: Well, Your Honor, I thought I was here to just talk about the material changes from the first to the second, but I can answer that as well.

I didn't believe we made any arguments in the footnotes. Correct me if I'm wrong, if you don't mind pulling it up.

But, yes, the reason for the chart was to make it easier for the clerks, the Judge, me -- thinking that's just how I think, if I could put everything on a spreadsheet I would be happy.

But, yes, I made the charts to make it easy. And then when I moved what was in the charts into the second amended complaint, I did so because I had the allotted pages left.

So that was my only thinking. I wasn't trying to

disrespect the Court in any way. We believe in order, we believe in your position, whatever you say goes.

I was really thinking it would be more simple for everybody, and that was the only reason for the charts. So if that answers your questions.

THE COURT: The charts I have less concern than the margins and the footnotes. I understand your argument you didn't make arguments in the footnotes. But briefs contain all kinds of things that aren't arguments -- information, citation -- and if we shove several pages of information in the footnotes and tighten the margins, we have obviously exceeded the page limits. That got us off to a bad start.

MS. EDWARDS: Yes, Your Honor.

THE COURT: Let's talk about the changes from the -- following the order striking the first amended brief.

So the order was clear that the second amended brief had to admit certain paragraphs, contain no other alterations. That's not what happened.

MS. EDWARDS: First of all, I'm sorry for any kind of disrespect that that was to you.

I -- we got down to the very last day, and I apologize for my motion to strike and vacate filing the day before my brief was done, but it came to the point where we just saw the facts that were in the charts were material,

and I really was just -- I was in a conundrum. So that's why I filed the motion to alter, amend or vacate only because I wanted to make sure that my client had all the facts presented. And also if -- to preserve it on appeal. If I don't bring it up in district court, I can't bring it up at the appellate court. And I didn't know what to do. That was -- that was my reasoning for that. And I apologize it happened on the last hour, you didn't even have time to review it or rule on it.

That was just where I was in the brief. And we were like, oh, no, we have to get these facts in. And because we had the page limit left, we thought that it would be okay and it would be easier to strike it than to file another brief.

So that was my only thinking filing that amended, alter or vacate.

THE COURT: Okay. Is it your ordinary practice to request page limit extensions, or do you regard this as an unusual case?

MS. EDWARDS: I would say this is a fact extensive case. I normally do ask for page extensions. I know the Middle District doesn't have a page limit requirement. I'm trying to learn everybody's different orders on how they do things.

We typically have to, because not only do we have

to respond to everything they say, but we have to include all the depositions that the defense doesn't bring up and all the facts in there.

And so the facts reason why is what we always request an extension. And we never really know how long that is, but we found in our practice that judges are normally allowing us ten, if we go above ten, they are saying no to us, and that's why I didn't request more than ten because we normally just get that ten page limit barrier, so that's why I asked for that.

THE COURT: Okay. Well, that's helpful for me to understand.

I guess my advice for moving forward would be this: Almost all cases at some point come up against a page limitation or word limitation -- the Alabama Supreme Court, this Court, the Eleventh Circuit, the Supreme Court -- if this had happened in the Eleventh Circuit, it would not be a conversation.

So I am certain that you have the ability not to do it this way. I actually don't really have an objection to fifteen page extensions when a lawyer tells me that they are sincerely needed because the case is very voluminous or there's been a lot of testimony.

But whatever the page extension or page limit is it has got to be adhered to. Because now my problem is not

just in this case. If this happens in this case, then I can expect to deal with it in all kind of cases going forward. And now you and I both have a lot more time into this case than we really need to.

All right. I think that's all I've got for you.

All right. Capstone, who is taking this?

MR. HOLBROOK: I'm going to take this one, Your Honor. I thought it would be appropriate, I was the principal drafter.

THE COURT: You were the principal drafter?

MR. HOLBROOK: Yes, Your Honor.

THE COURT: I was the principal drafter of briefs at a time as a lawyer and didn't speak at the oral argument, and always knew the judge was on the ball when they asked the lawyer who stood up and talked, did you draft the brief or did you just sign it.

MR. HOLBROOK: Yes, Your Honor.

THE COURT: I think you know what my question is for you. It has to do with the statement of undisputed fact. Paragraph 29, Doc 66.

The next morning, April 19th, 2019, a Friday, Langley discovered that McClinton had doctored the corrective action notice to indicate that he received only a verbal first warning and that the next action to be taken would be a suspension. There's some citations. Langley

knew that McClinton doctored the documents because the alterations that McClinton made in blue ink were clearly different than the black X marks that were auto-generated by the computer.

Was it your understanding that Mr. McClinton did not dispute that he had doctored the corrective action notice?

MR. HOLBROOK: No, Your Honor. Well, I want to make sure I'm answering this clearly.

So, it was never our intention to mislead the Court that this was a dispute between the parties. It's the central allegation in his complaint. It's in his testimony. We asked him about that at deposition.

And I think what we were trying to do, and it's clear that I wasn't clear in my drafting, was to make the argument, we did cite some cases for this proposition, that the factual dispute was not genuine. In other words, that he could not override pre-existing documents, documents that were contemporaneously created in time when this happened and that he could not effectively revise a Capstone policy through his own testimony. If I may explain a little why I mean that.

THE COURT: Well, I understand the law and all that.

MR. HOLBROOK: Sure, sure.

THE COURT: When I'm reading the briefs and I get to that point, I know, by now, just by this point of having the case, that he seriously disputes this fact. And I understand all your arguments about why it's not genuine and I -- those are arguments that would be the appropriate subject at a summary judgment hearing or a briefing or order or whatever.

But the assertion that the fact is undisputed, when I come to it and know that it is not accurate, you can see how I begin to doubt all of the other assertions. Because that one I just know by having worked with the case and familiar with the case, I know that's a central dispute issue, whether he doctored it or not, what testimony is on that.

But I don't necessarily off the top of my head know that anything else in here is misstated when I come upon it.

So now I am digging back through every statement to figure out, and this is similar to the thing I just said about further alterations being made in an amended brief after I ordered no further altercations, I've got to dig through the filing because I can no longer trust what's in there.

I don't need legal arguments on the disputed fact is genuine or not, I understand the law on that.

But how did it make it into the statement of undisputed fact?

MR. HOLBROOK: So, sort of subsidiary to the genuine issue, the argument that we are making, we relied -- and I realize I wasn't clear. I do apologize for that.

We were relying on the Burns versus Rogers case that we cited on Page 24 and that's where this Court quoted Scott vs. Harris and the Supreme Court, when opposing parties tell two different stories, one of which is blatantly contradicted by the record so that no reasonable jury can believe, the Court should not adopt that version of the facts for purposes of ruling on summary judgment.

That's what the courts -- the Supreme Court said in Scott. That case has been cited, as of this morning, I double checked, 6,614 times. This Court has relied on it to grant summary judgment. The Eleventh Circuit has affirmed summary judgment in the employment context for the employer under this standard, including an FMLA. And that case is Word vs. AT&T, 2014, Eleventh Circuit case, so that's what we were trying to do. I realize it wasn't clear. That was certainly not our --

THE COURT: It was more than not clear. I mean, it's inaccurate. There should have been some quality control mechanism that would have caught that -- your legal argument, you know, may be well founded. I completely

understand the legal argument, somebody who spends a lot of time dealing with summary judgment motions.

But the statement that he doesn't dispute -- now, there is a legal argument about whether his dispute matters, whether it is sufficient to create a genuine issue; what its legal function and significance is.

But to say that he doesn't dispute it isn't just unclear, it's the opposite of what's true.

So I will ask you like the same question I asked them which is, is it your ordinary practice, if you are going to make this argument, which I think is pretty common on summary judgment where the only evidence on some issue is the plaintiff's self-serving testimony, if you are going to make this argument, that you present the fact as undisputed, is this the first time that this has come up?

MR. HOLBROOK: Your Honor, that's not what we were trying to do. And we said, it's on Page 36 of our brief where we said that his self-serving allegation that Langley agreed to change corrective action notice is rebutted and we went through the categories of evidence, and then we went on to say, in our conclusion, his efforts to manufacture a dispute of fact based solely on this testimony should be rejected. That was in our conclusion.

And we did the same in our reply brief where we cite to the Word case. And, like I said, I very much

apologize for not being more clear. That's not what we were trying to do.

If I may just explain a little bit what our thinking was. He agrees -- we understand the central dispute again that he says he changed it.

Our position that we tried to articulate which was not clear, I can tell that from the Court's ruling, was that to understand why he had this document was -- excuse me, to understand his position that this document was changed, you have to ask, well, why is it that he's saying that it's changed. And he says that for two reasons.

He says, number one, Capstone has a mandatory progressive discipline policy that they have to follow.

And he says, number two, that he never received any discipline under this mandatory progressive discipline policy.

So the argument that we were trying to make was that not only does Capstone not have a progressive discipline policy, we cited the deposition testimony authenticating that document that says Capstone reserves the right to terminate an associate at any time for any reason with or without prior discipline. And it goes on to say, nothing in this handbook or any Capstone document is intended to promise progressive discipline or disciplinary counseling.

And then, Your Honor, we went through his second point which is, I have never received any verbal counseling or any discipline like that. And so because I have never received that, I can't receive this corrective action notice.

What we were trying to articulate is that he cannot create a dispute of fact by saying, even though the policy says this isn't progressive discipline, I'm saying that it is progressive discipline that's required. And even though he had all of this prior discipline for months before he even told Capstone that he needed back surgery, that he could just say, and this is what he testified, that none of this ever happened.

So that's what we were trying to articulate to say that this isn't actually in dispute. He is saying it. But he can't rewrite a document. That's what we tried to do on our reply brief as well, he would have the Court ignore or alter or amend the contents of these fourteen different categories of documents.

So, for example, on the change specifically, I want to flag some testimony in the brief --

MS. EDWARDS: Your Honor, if I --

THE COURT: You'll get a turn.

MR. HOLBROOK: So there's no dispute between the parties that Mr. Langley signed and dated the corrective

action notice before he handed it to Mr. McClinton.

And on the plaintiff's brief, they say, quote, Langley amended the corrective action notice form, signed the form, and then presented it to Mr. McClinton. That's the quote from their brief.

And then the plaintiff's testimony, he was asked the question: And then did he actually write on it what the changes were? Answer: He marked -- finished marking what wasn't marked and then he signed it, slid it back to me and I signed it.

Question: Who signed it first, you or he? Donald Langley signed it and slid it to me and I signed it.

Last question: Who wrote the blue ink next to the box termination? Well, it would be the same pen.

So, according to this plaintiff's testimony, Mr. Langley typed this out, comes in there, makes the amendment in a blue pen, then sets that blue pen down, signs it in a black pen, and then Mr. McClinton signs with the same blue pen that the changes were made with.

And that's what we were trying to convey was that this is not a genuine dispute of fact because no rational jury would believe that.

I have actually got a document here, I would like to offer it to the Court, I don't want to overstep, where we go through all of that prior discipline. The Court, I

believe, noted that was immaterial.

But our position would be because, A, all of this occurred before he even told us that he needed back surgery, and because all of the contents of that document are specifically referenced in the corrective action notice that tracks all this prior discipline, that again the plaintiff says, even though there is an email, it's very specific, oh, no, this never happened. What we were trying to convey was that this is not a genuine dispute of fact. He can't put this in dispute just by saying none of these five documented instances occurred. And then with the -- that no reasonable jury would believe the switch, contemporaneous in time with the change --

THE COURT: I fully understand the legal argument. But none of it is responsive to my concern.

By the time I got to the legal argument section of the brief, I didn't trust it because of what had been presented as undisputed fact. I understand it. I totally comprehend what you are saying and the reason that you are articulating the argument and the legal function of the argument.

But it is not undisputed that Langley discovered that McClinton had doctored the corrective action notice, that the doctored corrective action notice was internally inconsistent -- that is your position offered as a statement

of undisputed fact.

So the legal argument I get, and it's in the brief. I mean, it shows up in the brief and we would have talked about it at summary judgment hearing. But the problem is what's presented as an undisputed fact.

Now, your argument that the dispute ought to be overlooked because it's of no legal significance, I understand that is what you are trying to convey in the argument section of the brief.

But how these statements made it into a statement of undisputed fact is still what I'm concerned about.

MR. HOLBROOK: I understand that. What we were trying to do, and I printed out the Court's guidance on summary judgment briefing. I have to tell you, I had an associate look at sort of these parallels -- it's kind of an extension of the Sham Affidavit Doctrine, if you will. Had an associate look to make sure has this Court recognized this, that kind of thing. And so what we were trying to articulate was, again, it's not genuine because it's not backed up by any -- by any evidence other than just him saying it. Right?

Every time this man was confronted with a document in deposition, he either said, oh, that never happened. And there was one that was actually a counseling that he forwarded to him --

THE COURT: You could have made all of these arguments in Paragraph 29, literally never appeared in your brief. Or if you had included it in a section that says, you know, if you had reworded it to say, he disputes this, and later in this brief we are going to explain to the Court why his dispute ought to be overlooked, that would have been true and would have done no damage whatsoever to your argument.

The problem, I mean, this is really a self inflicted wound because I had not read the argument when I read Paragraph 29, so already alarm bells are sort of going off in my head before I ever get to your legal argument.

I think I have heard enough to understand where we are.

So I guess overall -- well, you wanted to say something before I --

MS. EDWARDS: Oh. Your Honor, I was just going to object because he was making a summary judgment argument at a --

THE COURT: I'm not worried about any of that. I have ruled on summary judgment. And I understand the argument that is not responsive to my particular concern, but I do correctly apprehend the argument having been through the briefs.

My concern about this situation is that, number

one, it potentially has made this case unsettleable because the fees are now so great. We have motions to strike, amended response briefs, I assume everybody spent some time getting ready for today, now we're all here. Everybody in the room has more time in the case than anybody needed to have. And we are roaring toward a trial where we are going to have a ton of time in the case.

I would caution you against any kind of lapses like this in the future.

I really do not know what an appropriate sanction is for any of this because this is not your client's fault. And I am past the point in the case where I can sort of craft a sanction that will not permanently negatively impact your client, if I strike a pleading or some evidence or construe evidence in a particular way, so I have to spend some time thinking about what an appropriate order will make clear this is not appropriate counsel conduct but that will not disadvantage anyone's client.

In the short term, my immediate concern is making sure that we are all clear that there has got to be better quality control as we roar into trial. There will be no time for this and there will be not nearly this amount of patience for it.

So, whatever internal processes you need to employ to make sure that we can comply with Court orders and what

we say in pleadings is actually verifiable, would be wise to employ at the earliest opportunity.

I am going to set this case for trial on May the 30th; that's a four-day week. But I recall from the 26(f) report we thought it was a three to four day trial. So I am assuming we can accomplish it in that week.

We'll drop our pretrial order later today but that will put your first deadline for witness and exhibit list somewhere in the early April range in order to allow time for motions in limine, objections, jointly proposed jury charges and all that.

I am not going to order the case to mediation again because we have already done that. And if there is not consensus among the lawyers that the case is not a good candidate for settlement, feels unreasonable to order it to mediation again.

But I would hope that the highest and best use for the next sixty days, other than getting ready for trial, would be to have serious conversations about trying to settle this case.

If the plaintiff is not in a position to pay for half of mediation, it's difficult for me to understand how plaintiff is in a position to go to trial.

I think the highest and best use of the next period of time would be to have conversations among the

lawyers that will facilitate a settlement.

This case is three year reportable in September of 2023, and our summer calendar is pretty full. I did not put this on Memorial Day week for fun. I did it because that is where I could find four neat days clustered together without other civil or criminal cases throughout the summer. So there is no ability to stay or continue the trial to accommodate a desire at the last minute to mediate further. It will be state court style, everything is happening at once, mediating while we are trying to get ready for trial, which is not any problem for me. But I know it's miserable for lawyers. I did it enough times to remember it well.

So I would encourage you not to take us to the brink in that way. Certainly understanding that we really are sort of at what is approaching the last moment for this case in terms of extensions and continuances.

I will commit that we will get a sanctions order out, what's today, the 24th, we will get a sanctions order out by the end of February. And I will give you each seven days from today to submit just like a short brief on what you think would be the most appropriate sanction, if any. By short, I mean like five to ten pages, normal double-spaced margins. If it doesn't take five to ten, that is not any problem. I don't need a legal tone. I want you to have opportunity to brief that or say something on that

because I realize what you came prepared with today is probably more explanation than legal argument about what the appropriate sanction is.

So that will be helpful. And then we commit to get an order out by the end of February so everybody knows where they stand as we get ready for trial.

Any questions?

MS. EDWARDS: No, Your Honor.

MR. HOLBROOK: No, Your Honor.

THE COURT: Thanks. Y'all a great day.

(COURT ADJOURNED)

C E R T I F I C A T E

I hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-referenced matter.

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Teresa Roberson, RPR, RMR